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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT TYRONE FOWLER,

Defendant and Appellant.

H044621

(Monterey County

Super. Ct. No. SS160150A)

A jury convicted defendant Vincent Tyrone Fowler of assaulting, criminally threatening, and twice raping Jane Doe, a 15-year-old close family friend. The trial court found true various prior conviction allegations, including that defendant had a prior serious felony conviction, and sentenced defendant to 61 years 8 months in prison. Defendant seeks reversal, arguing that the trial court committed prejudicial evidentiary error and erred in denying his mistrial and new trial motions, which were premised on a claim of incurably prejudicial prosecutorial misconduct. In a rehearing petition, which we granted, defendant alternatively seeks remand for resentencing in light of new legislation that took effect on January 1, 2019. That legislation, Senate Bill No. 1393 (2017-2018 Reg. Sess.), gives trial courts the discretion to strike prior serious felony convictions for purposes of the five-year enhancement for such prior convictions. We reverse and remand the matter for resentencing.

I. BACKGROUND

A. *Factual Background*

1. *The Assaults*

On October 26, 2015, 15-year-old Jane vomited at school. In addition to nausea, she experienced dizziness and a headache, symptoms she attributed to falling off her bed and hitting her head the prior day. The school nurse advised Jane to go home. Both Jane's mother and grandmother were working and could not pick her up. Jane's grandmother arranged for "Uncle Vince"—the defendant—to get Jane from school. While Jane considered defendant an uncle, the two are not related by blood.

Defendant, who was 44 years old at the time, picked Jane up from school and drove her to the house that he shared with his wife Susie, his stepson Chris, and Chris's girlfriend Crystal. Susie, Chris, and Crystal were all at home when defendant and Jane arrived. Jane slept on a couch in the living room all afternoon.¹ At 5:00 or 6:00 p.m., she awoke and watched part of a movie on her phone. Defendant sat on the couch and encouraged Jane to move closer to him. He put his arm around her and caressed her side, which made her uncomfortable. Eventually, defendant got up and Jane fell back asleep.

When Jane woke up again, she knocked on Chris's bedroom door, but he did not answer. She went outside where she found defendant, who said Susie was taking Crystal to work. Susie and Chris confirmed that Susie drove Crystal to work on the evening of October 26, 2015. Susie testified that the trip took her five to seven minutes each way and that she left the house around 6:20 p.m.

Jane went back inside; defendant followed her and sat beside her on the couch. He touched her thighs and told her she was his favorite niece. He then placed Jane's hand on his crotch. When she removed her hand, defendant replaced it; that happened

¹ Jane testified that the couch she slept on was green. Susie and Chris testified that the green couch was no longer in the living room on October 26, 2015, having been moved to the garage in May 2015 and replaced with a beige couch.

three or four times. Defendant then pulled down his sweatpants, exposing his penis. He told Jane to “go down on” him, placed his hand on the back of her head, and pushed her head down until his penis was in her mouth. Jane testified that she was scared because “[k]nowing his past, [she] didn’t know what he would do to [her].” Her retainers got “caught” or “clamped” down on his penis.

Defendant told Jane to get up and led her outside. In the backyard, he pulled her pants down and told her to bend over. She started crying and asked “why?” Defendant responded, “Just do it.” Jane complied. Defendant penetrated her vagina with his penis for what she estimated was 10 minutes, stopping when Susie returned home. Defendant told Jane not to say anything or he would “do [her] how he did the others.” Jane testified that, “[b]ased on [defendant’s] past,” she took that to mean he would “kill” her and she believed him.

Inside, Jane did not tell Susie about the rape because Jane thought Susie would not believe her and that doing so would put Jane’s life in danger. Both Jane and Susie testified that Susie went into the bedroom after returning home from dropping Crystal off at work. After Susie left the room, defendant told Jane he was “going to do it again.” Jane replied “[o]kay,” because she thought he was going to hurt her if she refused. At defendant’s direction, Jane got on all fours on the floor. Defendant penetrated her vagina from behind. Jane grabbed onto a large cabinet in front of her; each time defendant thrust, it knocked against the wall. Jane hoped Susie would hear the banging and come out.²

According to Jane, after defendant had been penetrating her for about 10 minutes, Susie came into the living room and asked “[w]hat are you doing?,” which caused defendant to stop. Susie testified that she came out of the bedroom after five to seven minutes and saw Jane on her hands and knees beside the couch, naked from the waist

² Susie and Chris testified the cabinet was too heavy to move. Susie denied hearing any knocking while she was in the bedroom.

down. Susie said that defendant was on the couch, fully clothed, in “the position he’s in whenever he falls asleep on the couch.” She thought he was asleep, although she did not see whether his eyes were open or closed.

2. *The Immediate Aftermath*

According to Jane, Susie threw something, grabbed Jane’s hair and hit her, and then turned her attention to defendant, hitting him. Chris came into the room; Jane took him outside and told him defendant had raped her. Jane testified that Chris went back inside and started yelling at defendant. Meanwhile, Jane fled. She knocked on the door of one house, but no one answered. When Jane was 800 or 900 yards from defendant’s house, she saw her mother approaching in her car. Jane flagged her mother down and said defendant had raped her. Jane’s mother testified that Jane was crying, screaming, and shaking when she disclosed the rape. Jane’s mother insisted on going back to defendant’s house. According to Jane, Chris was outside throwing things out of anger, while Susie and defendant were fighting in the street. Jane went inside to retrieve her belongings. Jane testified that she was no longer wearing her underwear when she left defendant’s house and that she did not know what happened to them. Jane started bleeding vaginally after leaving defendant’s home because, she testified, she got her period.

Susie testified that she “flipped out” “seeing [Jane] in that position” with “her rear . . . exposed.” Susie started yelling “what the fuck is going on?” She threw a glass of wine at defendant, hitting him in the face and causing him to bleed. Susie denied hitting Jane. According to Susie, Chris came out of his bedroom to see what was going on and tried to break up the fight between herself and defendant.

Chris, who testified for the defense, said he was in his room playing video games when he heard “What the fuck?” and the sound of glass breaking. He came out to the living room where he saw his mother hitting defendant. Chris initially testified that he “blacked out” after seeing blood on his mother; he said the next thing he remembered

was Jane's mother telling him to calm down. However, Chris later testified that he "vaguely" remembered his mother and defendant assuring him that the blood belonged to defendant, not his mother. Chris denied speaking with Jane. He testified that after Jane and her mother returned to the house to retrieve some of Jane's things, he went to his best friend's house "to calm down" and did not return until "2 o'clock" the following morning.

3. *The Investigation*

After leaving defendant's house and stopping briefly at home, Jane and her mother went to Natividad Hospital where Jane underwent a Sexual Assault Response Team (SART) exam. Jaime Haaland, a SART nurse who testified as an expert in sexual assault forensic examination, performed Jane's SART exam beginning at 10:00 p.m. on October 26, 2015. The SART exam began with an interview, during which Jane told Haaland that defendant "took [her] head and pushed it down," forcing her to orally copulate him. Jane also told Haaland that defendant penetrated her vagina with his penis and that defendant threatened "to kill [her] just like [he] did the first person" if she screamed. Jane said the assault took place on the living room couch. She told Haaland there might be a bite mark on defendant's penis.

Haaland collected Jane's clothing, including jeans, a bra, and a sweatshirt. Jane was not wearing underwear; she told Haaland it was at defendant's house. Haaland observed blood in Jane's jeans and during Jane's vaginal exam. Haaland noted no acute injury to Jane's vagina. Haaland testified that if a woman who is "getting ready to start [her] period" has vaginal intercourse, any resulting "trauma to the cervix could potentially open the cervix enough to allow the menstrual cycle to start early." Haaland swabbed Jane's body for potential DNA evidence.

At about 1:00 a.m. on October 27, 2015, police came to defendant's house. Susie answered the door and woke defendant. According to Susie, defendant had taken off his clothes when he went to bed and put on clean clothes when officers arrived. Ten days

later, police came back to the house to collect evidence, including a pair of defendant's sweatpants. Susie had washed the dirty clothes by then.

Haaland performed a SART exam on defendant at 2:45 a.m. on October 27, 2015. She testified that, to prevent cross-contamination, she performed Jane and defendant's SART exams in different rooms and changed her clothes and equipment and washed up between exams. Haaland swabbed defendant's body for potential DNA evidence and collected the clothing he was wearing as evidence. She did not observe a bite mark on his penis.

Christina Gunter, a police investigator with the Monterey County District Attorney's Office, interviewed Jane on October 30, 2015, four days after the alleged assaults. At that time, Jane told Gunter that defendant first raped her between 6:00 and 6:30 p.m., while defendant's wife was taking her son's girlfriend to work. Jane said defendant put her hand on his crotch while they sat on the couch together. Defendant then pushed her down onto her stomach, removed her pants and underwear, and penetrated her vagina with his penis. Afterwards, defendant put her underwear in his pocket and threatened to kill her if she told anyone. After defendant's wife returned home and went into the bedroom, defendant pushed Jane's head down so that his penis went into her mouth; Jane said she unintentionally bit down. Defendant then pushed her down to the ground and raped her from behind while she was on all fours. During that rape, Jane held onto a large bookcase, which banged against the wall when defendant thrust. The rape stopped when defendant's wife walked into the room. Gunter did not recall Jane saying one of the rapes occurred outside.

Jane initially told Gunter that she was a virgin prior to the rapes. However, after further questioning and discussion, Jane admitted she had not been a virgin. According to Gunter, Jane believed she was a virgin because "she had attempted [vaginal intercourse], but it hadn't gone all the way in before," and she engaged in self-stimulation

“with items.” The investigator expressed the belief that such self-stimulation “could have prevented” Jane from remaining a virgin.

4. Physical and DNA Evidence

Linh Dang, a senior criminalist with the California Department of Justice, testified as an expert in serology and collection of biological fluids. Dang testified that acid phosphatase, or AP, and P30 are enzymes that are present in high concentrations in seminal fluid and at lower concentrations in other bodily fluids, such as vaginal fluid, urine, and breast milk. On November 5, 2015, Dang examined couches, blankets, and comforters at defendant’s house for evidence of a sexual assault. She found fluorescing stains on the living room couches and a green couch located in the garage, all of which tested negative for AP, indicating the stains were not seminal fluid. She did not test the couches for P30.

Dang also performed tests on swabs from the SART exams and clothing evidence. She concluded that one of Jane’s vaginal swabs was positive for P30. And she detected two stains on the interior of Jane’s jeans, near the crotch area, that tested positive for P30.

Dang testified that there was a two-inch long rip in the bag containing Jane’s jeans when she received it. Dang documented the rip and sealed the bag with tape. It was never established at trial when or how the bag ripped. The SART nurse testified that the bag was intact when she initially placed the jeans in it. Deputy Sheriff Scott Davis took the SART exam evidence, including the bag containing Jane’s jeans, from the SART nurse and placed it in the evidence locker. He did not observe any damage to the bag containing the jeans.

Christopher Tanforan, a senior criminalist with the California Department of Justice, testified as an expert in forensic DNA analysis. Tanforan performed DNA analysis on one of the P30-positive stains Dang identified on the interior crotch of Jane’s jeans. He concluded that the stain contained a mixture of DNA from two contributors. The major contributor, meaning the source of most of the DNA, was female and the

minor contributor was male. According to Tanforan, “there wasn’t very much information” for the minor contributor. Specifically, DNA from the minor contributor was found at four of 15 locations (or loci) tested, resulting in only a partial DNA profile. That partial profile was consistent with defendant’s DNA profile, “meaning that all the areas that were de[t]ected for this minor four-locus profile were present in [defendant’s] reference profile.” Tanforan testified that the chance of a random, unrelated African-American having that partial profile was approximately one in 13,000.³

Tanforan also examined a swab of the interior crotch of Jane’s jeans. It likewise contained a mixture of DNA from two contributors. The major contributor was “a female 15-locus profile, which matched Jane Doe’s reference profile.” A single allele was detected from the minor contributor. That allele was consistent with defendant’s DNA profile, meaning he could not be excluded as being its source. An estimated one in 13 African-Americans would be expected to have that single allele.

A swab of Jane’s left breast contained a DNA mixture. Tanforan assumed Jane was a contributor to that mixture, and, based on that assumption, identified two alleles from a minor contributor. Those two alleles were consistent with defendant’s DNA profile. Tanforan estimated that the frequency of those two alleles in the African-American community to be one in 10.

Tanforan testified that there was no sperm on Jane’s vaginal and cervical swabs or on defendant’s penile and scrotal swabs. None of Jane’s DNA was found on defendant’s penile and scrotal swabs or on defendant’s sweatpants.

³ Tanforan testified to the frequency with which the DNA profiles he isolated occur in the African-American population only. There is no evidence in the record as to defendant’s race. At oral argument, neither defendant’s appellate counsel nor the deputy attorney general could tell us defendant’s race. Given the absence of any relevance objection to Tanforan’s testimony, it seems likely that defendant is African-American, something jurors presumably could observe but that is lost on the cold appellate record. Nevertheless, given the uncertainty, we disregard Tanforan’s statistical frequency testimony.

Another senior criminalist, Sarah Calvin, testified as an expert in YSTR DNA analysis, which is the examination of DNA at 17 locations on the Y chromosome. Calvin explained that only males have Y chromosomes, which they receive—unaltered—from their fathers. Therefore, all men in the same paternal line possess the same YSTR DNA profile (or haplotype), making YSTR testing “not as discriminating as the autosomal DNA” testing.

Calvin analyzed a swab of the interior crotch of Jane’s jeans and detected a mixture of two YSTR haplotypes, indicating two male contributors. The major YSTR haplotype was consistent with defendant’s YSTR haplotype at all 17 locations tested. Calvin testified that the major YSTR haplotype would be expected to occur in approximately one in 2,100 African-Americans, one in 2,500 Caucasians, and one in 1,600 Hispanics.

Calvin also analyzed the P30-positive stain on Jane’s jeans that Tanforan examined. Calvin detected a partial five locus haplotype that was consistent with defendant’s YSTR haplotype. That partial five locus haplotype would be expected to occur in approximately one in 12 African-Americans, one in 430 Caucasians, and one in 160 Hispanics.

Suzanna Ryan, a forensic DNA consultant, testified for the defense as an expert in DNA testing. She reviewed the SART reports, the police and investigative reports, and the serology and DNA reports, as well as the analysts’ contemporaneous notes and underlying data. Ryan testified that she had no dispute with the results of Tanforan’s DNA analysis on the P30-positive stain from Jane’s jeans—namely, that the partial profile for the minor male contributor was consistent with defendant’s DNA profile and would occur in approximately one in 13,000 African-Americans. She did, however, disagree with Tanforan’s interpretation of the results of the DNA analysis of Jane’s left breast swab. Tanforan identified two alleles from a minor contributor, which were consistent with defendant’s DNA profile. According to Ryan, there also was “DNA

present just below the analytical threshold” at another location, which was not consistent with defendant’s DNA profile. In her view, the left breast swab either should not have been interpreted at all or should have been interpreted to exclude defendant.

Ryan criticized aspects of the evidence collection and analysis procedures employed in this case as creating the possibility for cross-contamination. For example, the same DNA analyst extracted DNA from both Jane’s swabs and defendant’s swabs on the same day, using the same instrument. And the same SART nurse performed back-to-back SART exams on Jane and defendant. Ryan opined that those procedures could lead to cross-contamination, although she could not say whether such contamination actually occurred.

B. Procedural History

On November 23, 2016, the Monterey County District Attorney filed a first amended information charging defendant with two counts of forcible rape (Pen. Code, § 261, subd. (a)(2))⁴; forcible oral copulation of a minor who is 14 years of age or older (§ 288a, subd. (c)(2)(C)); assault of a person under 18 years of age with the intent to commit rape, sodomy, oral copulation, or any violation of section 264.1, 288, or 289 (§ 220, subd. (a)(2)); and making criminal threats (§ 422, subd. (a)). The first amended information further alleged four enhancements: defendant had a prior strike conviction (§ 1170.12), a prior serious felony conviction (§ 667, subd. (a)(1)), committed a new violent felony after a prior violent felony (§ 667.5, subd. (a)), and suffered a prior prison term (§ 667.5, subd. (b)).

The case proceeded to a jury trial. After hearing four days of testimony and deliberating less than a day, jurors returned guilty verdicts on all counts on March 7, 2017. Following a court trial on the enhancements, the trial court found each allegation to be true.

⁴ All further statutory references are to the Penal Code unless otherwise indicated.

At an April 25, 2017 sentencing hearing, the trial court sentenced defendant to a term of 61 years 8 months in prison. The court imposed an 18-year term on count 1 (the middle term of nine years doubled pursuant to the Three Strikes law, § 1170.12, subd. (c)(1)); a consecutive 18-year term on count 2 (the middle term of nine years, doubled); a consecutive 16-year term on count 3 (the middle term of eight years, doubled); a consecutive four-year eight-month term on count 4 (one third the middle term of two years four months, doubled); and a four-year term on count 5 (the middle term of two years, doubled), stayed pursuant to section 654. The court also imposed a consecutive five-year enhancement for the prior serious felony conviction (§ 667, subd. (a)(1)). The court imposed and stayed under section 654 a one-year prior prison term enhancement (§ 667.5, subd. (b)) and a three-year violent felony prison prior enhancement (§ 667.5, subd. (a)).

Defendant timely appealed.

II. DISCUSSION

A. Admission of Evidence of Defendant's Prior Murder Conviction Was Not Error

1. Background

In response to a request by the prosecutor and over defense counsel's Evidence Code section 352 objection, the court ruled before trial that the prosecutor could elicit testimony from Jane that she knew defendant had previously been convicted of murder. The court noted that the conviction was not being admitted as character evidence, but rather "only" to support Jane's "reasonable fear" and to explain her failure to immediately report despite the presence of other adults. The court further ruled that the prosecutor would be allowed to prove the fact of the prior murder conviction through one other source. At trial, the court admitted a certified copy of the abstract of judgment as proof of defendant's prior murder conviction.

At the close of trial, the court gave CALCRIM No. 303 regarding the use of evidence admitted for a limited purpose. Specifically, the court instructed jurors that evidence of the defendant's murder conviction was admitted for "a limited purpose" and "may be considered by you in determining the impact of any threat made by the defendant, if you find such threat was made. You may consider this evidence only for that purpose and for no other."

2. *Legal Principles and Standard of Review*

Only relevant evidence is admissible. (Evid. Code, § 350.) The Evidence Code defines "relevant evidence" broadly as "evidence . . . having *any tendency in reason* to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id.*, § 210, italics added.) " '[T]he trial court has broad discretion to determine the relevance of evidence.' " (*People v. Tully* (2012) 54 Cal.4th 952, 1010.)

A trial court has the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) For purposes of Evidence Code section 352, evidence is "prejudicial" if it " ' "uniquely tends to evoke an emotional bias against defendant" ' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121 (*Kipp*).) " ' "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." ' " (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

“On appeal, ‘an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.’ ” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008; *Kipp, supra*, 26 Cal.4th at p. 1121 [“We apply the deferential abuse of discretion standard when reviewing a trial court’s ruling under Evidence Code section 352”].) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.)

3. *The Court Did Not Err in Admitting Evidence of Defendant’s Prior Murder Conviction*

Defendant maintains the trial court abused its discretion under Evidence Code section 352 by admitting evidence of his prior murder conviction because, he says, the probative value of that evidence was substantially outweighed by the probability that its admission would create substantial danger of undue prejudice. Because defendant’s prior murder conviction and Jane’s knowledge thereof were essential to proving elements of the charged offenses, we find no abuse of discretion.

Defendant was charged, in count 5, with making a criminal threat in violation of section 422, subdivision (a). “In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant ‘willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,’ (2) that the defendant made the threat ‘with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,’ (3) that the threat—which may be ‘made verbally, in writing, or by means of an electronic communication device’—was ‘on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,’ (4) that the threat actually caused the person threatened ‘to be in sustained fear for his or her own safety or for his or her immediate family’s safety,’ and (5) that the threatened person’s fear was ‘reasonabl[e]’ under the circumstances.”

(*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) Here, the alleged criminal threat was defendant's statement to Jane that he would "do [her] how he did the others" if she disclosed the first rape. Without any context, the meaning of defendant's statement is unclear. His prior murder conviction was relevant to explain why Jane understood that statement to be a death threat. Defendant's prior conviction and Jane's knowledge thereof also were probative of the reasonableness of Jane's fear, an element of a section 422 violation. (See *People v. Garrett* (1994) 30 Cal.App.4th 962, 967 (*Garrett*) [evidence that the victim knew of defendant's prior conviction for manslaughter held to be "extremely relevant and probative in terms of establishing" the elements of the charged crime of making criminal threats].)

In counts 1 and 2, defendant was charged with two counts of forcible rape of a child over the age of 14 in violation of section 261, subdivision (a)(2). "Forcible rape is 'an act of sexual intercourse accomplished . . . [¶] . . . [¶] . . . against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.' (§ 261, subd. (a)(2).)" (*People v. Harris* (2013) 57 Cal.4th 804, 850.) As the jury in this case was instructed, "[d]uress means a direct or implied threat of force, violence, danger, or retribution that would cause a reasonable person to do or submit to something that she would not do or submit to otherwise." (CALCRIM No. 1000.) And, as jurors also were instructed, "[i]ntercourse is accomplished by fear if the female is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it." (*Ibid.*) Defendant's prior murder conviction and Jane's knowledge of it were probative of whether defendant accomplished sexual intercourse with Jane by means of duress or fear.

The evidence also was relevant to count 3, which charged defendant with forcible oral copulation of a minor over the age of 14 in violation of section 288a, subdivision (c)(2)(C). Like forcible rape, forcible oral copulation is accomplished against the victim's will by means of force, violence, duress, menace, or fear of

immediate and unlawful bodily injury on the victim or another person. (§ 288a, subd. (c)(2)(C).) Accordingly, Jane’s knowledge of defendant’s prior murder conviction was probative of whether defendant accomplished the oral copulation with Jane by means of duress or fear.

In sum, the evidence of defendant’s prior murder conviction and Jane’s knowledge of it were relevant to prove the elements of the charged offenses of criminal threats, forcible rape, and forcible oral copulation. The trial court sought to limit the prejudicial effect of the prior conviction evidence by instructing the jury that the evidence could be considered only for the limited purpose of determining the impact of any threat defendant made—“in other words, by negative implication, it would be improper for the jury to consider this evidence as establishing defendant’s criminal propensity.” (*People v. Fuiava* (2012) 53 Cal.4th 622, 669.) In light of the significant probative value of the challenged evidence and the instruction designed to limit its prejudicial effect, we cannot say the trial court abused its discretion in admitting evidence of defendant’s prior murder conviction. (*Id.* at p. 670; *Garrett, supra*, 30 Cal.App.4th at p. 967 [“Seldom will evidence of a defendant’s prior criminal conduct be ruled inadmissible when it is the primary basis for establishing a crucial element of the charged offense”].)

B. The Trial Court Did Not Err in Denying Defendant’s Mistrial and New Trial Motions

1. Factual Background

a. The Prosecutor’s Opening Statement

The prosecutor, shortly after beginning his opening statement, told jurors: “This is a case about the defendant, Vincent Fowler, taking what he wants when he sees it. Because you’re going to hear about his predatory impulse. And the same predatory impulse that led to him being convicted of murder and taking a human life is the same impulse that led to him taking the dignity of then 15-year-old Jane Doe on October 26th, 2015.” The court stopped the prosecutor; following a bench conference, the court struck

“everything” the prosecutor had “said so far,” which the court explained “means don’t pay any attention to it at all.” The court also reminded jurors that “statements of counsel are not evidence” and invited the prosecutor to “start over.”

The prosecutor began again by stating: “So what you’ll hear is this, is that Jane Doe was aware of Mr. Fowler being convicted of murder. Okay. And what you’ll hear is about his impulse. And he used that fact on her when he raped her twice, on one occasion on the same day, on another occasion on the same day, and forced her head down on his penis. [¶] And you’ll hear that when he did so, he told her, ‘If you tell anyone, if you scream, I’m going to kill you like the last one.’ ” Defense counsel did not object.

b. The Unsuccessful Mistrial Motion

Defense counsel moved for a mistrial based on the prosecutor’s “statements during opening where he went against the [c]ourt’s order and started using the prior conviction of a [section] 187 as if it was propensity evidence or some kind of character evidence and immediately inflamed the jury.” Defense counsel acknowledged that “the [c]ourt made [the prosecutor] start again” and the availability of limiting instructions, but argued that “the jury can’t unhear that.”⁵ The trial court denied the motion.

c. The Unsuccessful New Trial Motion

Defendant moved for a new trial on multiple grounds, including that the prosecutor committed incurably prejudicial misconduct in his opening statement and the

⁵ On appeal, defendant contends the motion for a mistrial was based on *two* instances of alleged prosecutorial misconduct—the portion of the prosecutor’s opening statement that the court ordered stricken and disregarded as well as his subsequent description of defendant’s threat, which defendant says was inaccurate. No objection was made to the second statement. The record belies defendant’s characterization of the mistrial motion. Defense counsel’s argument in favor of a mistrial was that “the jury can’t unhear” the objectionable statements, despite the fact that the court “made [the prosecutor] start again.” Plainly, defense counsel based the motion for a mistrial solely on the statements the prosecutor made before he was made to start over. We limit our consideration to those comments.

trial court erred in denying the mistrial motion. The trial court denied the new trial motion, reasoning that its admonition cured any prejudice. In so ruling, the court noted that it had made “a pretrial ruling allowing the defendant’s conviction for 187 to be corroborative of the 422 charge, however not to be admissible as character evidence.” The court opined that the prosecutor “did not purposefully violate” that pretrial ruling, but rather misunderstood it.

2. *Denial of Mistrial Motion Was Not an Abuse of Discretion*

Defendant contends the trial court erred in denying his mistrial motion because the prosecutor’s “predatory impulse” comment constituted incurably prejudicial prosecutorial misconduct. The Attorney General downplays the statement, referring to it as a mere “reference[]” to defendant’s prior murder conviction and suggesting that it would have been a “misinterpretation” to understand the comment as making a propensity argument. While we agree with defendant that the prosecutor plainly encouraged jurors to use evidence of defendant’s prior conviction as propensity evidence in violation of the court’s pre-trial ruling, we conclude that misconduct was harmless. Accordingly, we discern no abuse of discretion in the denial of defendant’s motion for a mistrial.

a. *Legal Principles and Standard of Review*

“ ‘ “A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]” ’ [Citation.]” (*People v. Penunuri* (2018) 5 Cal.5th 126, 149.) Accordingly, we review rulings on motions for mistrial under the deferential abuse of discretion standard. (*Ibid.*)

“ ‘The applicable federal and state standards regarding prosecutorial misconduct are well established.’ ” (*People v. Hill* (1998) 17 Cal.4th 800, 819.) “ ‘A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct

by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.’ ” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.)

A prosecutor commits misconduct by violating a prior evidentiary ruling. (*People v. Friend* (2009) 47 Cal.4th 1, 33 (*Friend*).) “[A] determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct.” (*People v. Crew* (2003) 31 Cal.4th 822, 839 (*Crew*).) “A defendant’s conviction will not be reversed for prosecutorial misconduct [that violates state law] unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.” (*Ibid.*)

“Character evidence, sometimes described as evidence of a propensity or disposition to engage in a type of conduct, is generally inadmissible to prove a person’s conduct on a specified occasion.” (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159, citing Evid. Code, § 1101, subd. (a).) The general ban against admitting character evidence to prove conduct does not prohibit admission of “evidence that a person committed a crime . . . when relevant to prove some fact . . . other than his or her disposition to commit such an act.” (Evid. Code, § 1101, subd. (b).)

b. The Prosecutor’s Statement, While Misconduct, was Not Prejudicial

The prosecutor stated that the “predatory impulse that led to [defendant] being convicted of murder and taking a human life” also caused him to rape Jane. That statement can be understood only as using defendant’s prior murder conviction to prove his disposition (his “predatory impulse,” in the prosecutor’s words) to commit the charged crimes. Plainly, the prosecutor violated the trial court’s pretrial ruling that evidence of defendant’s prior murder conviction was inadmissible as character evidence.

In doing so, he committed misconduct (*Friend, supra*, 47 Cal.4th at p. 33), regardless of whether the violation was intentional (*Crew, supra*, 31 Cal.4th at p. 839).

The question on appeal is whether the trial court abused its discretion in concluding that misconduct was not incurably prejudicial. It did not. Indeed, for the reasons set forth below, we conclude the prosecutorial misconduct was not prejudicial, let alone incurably so.

“Disclosing a defendant’s prior criminality to the jury can prejudice the defendant’s case.” (*People v. Perez* (2018) 4 Cal.5th 421, 459.) But, here, the court had ruled that jurors could learn of defendant’s prior conviction. It is the prosecutor’s improper use of that admissible evidence that is at issue. The trial court acted quickly to halt that improper use, strike the prosecutor’s comment from the record, and admonish the jury to disregard it. The trial court also instructed jurors that “[n]othing that the attorneys say is evidence” and to consider evidence of the defendant’s murder conviction “in determining the impact of any threat made by the defendant” and “for no other” purpose. We presume the jury followed those instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

The evidence of defendant’s guilt was strong. Jane provided a detailed account of the assaults, which was largely consistent with the accounts she gave to the SART nurse and to police investigator Gunter. For example, Jane told the SART nurse and Gunter that (1) defendant made her orally copulate him by pushing her head down towards his penis, (2) she bit defendant’s penis, (3) defendant threatened to kill her, and (4) defendant penetrated her vagina with his penis. She repeated all those assertions at trial.⁶ Also

⁶ Jane told the SART nurse and police investigator Gunter that she bit defendant’s penis. At trial, she testified that she “closed [her] mouth, . . . [her] teeth . . . touch[ed, her] retainers clamped,” and his penis got “caught on [her] retainers.” She said that what happened “wasn’t necessarily biting.” Defendant argues Jane “backpedaled” at trial, demonstrating a lack of credibility. We view Jane’s trial testimony—in which she essentially described biting down on defendant’s penis—as entirely consistent with (if more nuanced than) her prior statements.

consistent with her trial testimony, Jane told Gunter that defendant (1) put her hand on his crotch while they sat on the couch, (2) raped her once while his wife was taking her son's girlfriend to work, and (3) raped her a second time while his wife was in the bedroom. Jane told Gunter that, during the second rape, she was on all fours on the ground and she held on to a bookcase so it would bang into the wall. Jane offered the same description of the second rape at trial.

Jane's accounts were not without inconsistency. She wavered as to when the oral copulation occurred, telling Gunter it happened prior to the second rape, initially testifying at trial that it took place before the first rape, and, when confronted with her statements to Gunter, testifying that defendant made her orally copulate him before each rape. While Jane told Gunter that defendant put her underwear in his pocket, by the time of trial she could not recall what happened to her underwear, though she knew she left defendant's house without it. And, most notably, Jane never described the first rape as occurring outside until trial. However, these inconsistencies did not significantly impair Jane's credibility because, as discussed below, defendant's own wife's testimony lent credence to Jane's claims.

Susie confirmed important details of Jane's account. For example, Susie acknowledged that she left the house to take Crystal to work and, shortly after returning home, went into her bedroom for several minutes. Most significantly, Susie testified that, when she returned to the living room, Jane was on all fours and naked from the waist down. Susie's claim that defendant was innocently asleep on the couch not only was implausible, but also was undermined by her testimony that she became enraged, threw a glass at defendant's face, and physically attacked him.

Defendant's attacks on Jane's credibility are unpersuasive. He argues Jane was not credible because she testified the living room couch was green while other witnesses testified it was beige, the green couch having been moved to the garage months earlier. That discrepancy would have significance if there were any dispute as to whether Jane

was in defendant's house at the time of the alleged assaults. But no such dispute existed. Susie and Chris acknowledged that Jane spent most of that day on the living room couch in question. Since Jane plainly had the opportunity to observe the couch, her apparent error regarding its color suggested only a minor memory lapse or a lack of attention to detail, not that her story was fabricated.

Defendant also places significance on the fact that Jane initially told investigators she was a virgin and later admitted she was not. But the testimony of the investigator to whom Jane made those statements indicates that Jane was not being willfully dishonest when she described herself as a virgin. Rather, Jane believed she was a virgin because "she had attempted [sex], but it hadn't gone all the way in before," and she engaged in self-stimulation "with items." The investigator expressed the belief that such self-stimulation "could have prevented" Jane from remaining a virgin. Jane's apparent confusion as to whether she was a virgin, or disagreement with the investigator's definition of that word, did not undermine her credibility.

The physical evidence was consistent with Jane's testimony. P30, which indicates the presence of seminal fluid, was detected on one of Jane's vaginal swabs and on the interior crotch of her jeans, lending credence to her rape claims. And while the DNA evidence did not conclusively identify defendant as the source of DNA found on Jane's jeans and on her breast, it also did not exclude him. Defendant notes that seminal fluid was not detected on the living room couch or rug and that sperm cells were not found on Jane's vaginal or cervical swabs or on swabs taken from his penis and scrotum. But the absence of such evidence indicates only that defendant did not ejaculate, which jurors reasonably could have concluded was the case given Jane's testimony that each rape was interrupted. Defendant also points to the absence of Jane's DNA on his sweatpants and on his penile and scrotal swabs. But the lack of such evidence was not particularly probative in this case, given there was evidence that defendant had the opportunity to

clean himself prior to his SART exam and his sweatpants had been washed by the time police collected them as evidence.

Defendant sought to discredit the physical evidence by raising the possibility of cross-contamination, particularly of Jane's jeans, which were stored in a damaged bag. But even discounting the physical evidence, Jane's testimony—corroborated as it was by her mother, the SART nurse, Gunter, and Susie—made for a strong case against defendant.

In sum, because the court ordered the improper comment stricken from the record and admonished the jury to disregard it, and given the strength of the evidence of defendant's guilt, it is not reasonably probable that jurors would have reached more favorable verdicts to defendant had they not heard the prosecutor's improper character evidence argument. Therefore, the denial of defendant's motion for a mistrial was not an abuse of discretion.

3. *Denial of New Trial Motion Was Not an Abuse of Discretion*

Section 1181 specifies the circumstances in which a court may grant a criminal defendant a new trial. They include “when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury.” (§ 1181, subd. 5.) “ ‘We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.’ [Citations.] “ ‘A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.’ ” [Citation.]” (*People v. Lightsey* (2012) 54 Cal.4th 668, 729.)

Defendant's new trial motion, like his mistrial motion, was premised on the prosecutor's “predatory impulse” comment. Given our conclusion that the prosecutor's remark, while improper, did not result in prejudice, the trial court did not abuse its discretion when it denied the motion for a new trial. (§ 1181, subd. 5 [authorizing a new trial in cases of *prejudicial* prosecutorial misconduct only]; *People v. Hardy* (1992) 2

Cal.4th 86, 213 [“The trial court necessarily decided that any prosecutorial misconduct did not require a new trial and that court was in a better position to make that decision. Because the decision was not ‘plainly wrong,’ we have no occasion to upset it”].)

C. Senate Bill 1393

The trial court found true an allegation that defendant had suffered a prior serious felony conviction and, accordingly, imposed a consecutive five-year term under section 667, subdivision (a)(1), as it was statutorily required to do at the time of defendant’s sentencing. (Former § 667, subd. (a)(1) [“any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively”]; former § 1385, subd. (b) [“This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667”].) “On September 30, 2018, the Governor signed Senate Bill 1393 which, effective January 1, 2019, amends sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

Briefing in this case was completed before the Governor signed Senate Bill 1393. After we issued our original opinion on October 30, 2018, defendant filed a petition for rehearing seeking remand for resentencing in light of Senate Bill 1393. We requested an answer from the Attorney General. He took the position that defendant’s claim was not ripe because Senate Bill 1393 had not taken effect. But he conceded that defendant’s judgment was not likely to become final prior to Senate Bill 1393’s January 1, 2019

effective date; that, if the judgment was not final when Senate Bill 1393 took effect, then it would apply to defendant; and that, under Senate Bill 1393, remand would be appropriate in this case. We granted the petition for rehearing.

We agree with the Attorney General that Senate Bill 1393 applies retroactively to defendant. Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), “[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date.” (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) “The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) Because nothing in Senate Bill 1393 suggests any legislative intent that the amendments apply prospectively only, “it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019.” (*Garcia, supra*, 28 Cal.App.5th at p. 973.)

We further agree with the Attorney General that remand is appropriate in this case. “ ‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.] In such circumstances, [our Supreme Court has] held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ [Citations.]” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) The record before us does not clearly indicate that the trial court would have declined to strike defendant’s prior serious felony conviction for sentencing

purposes if it had the discretion to do so. (Cf. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand for resentencing because “the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence . . . by imposing two additional discretionary one-year enhancements” and describing the defendant as “ ‘the kind of individual the law was intended to keep off the street as long as possible’ ”].) Accordingly, remand is appropriate in this case to allow the trial court to exercise its discretion as to whether to strike his prior serious felony conviction for sentencing purposes.

III. DISPOSITION

The judgment is reversed and the matter is remanded to the superior court with directions to resentence defendant in light of sections 667 subdivision (a) and 1385 subdivision (b), as amended by Senate Bill 1393.

ELIA, J.

WE CONCUR:

GREENWOOD, P. J.

DANNER, J.